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In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF SAC AND FOX NATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF SAC AND FOX NATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37, the Sac and Fox Nation, (hereinafter referred to as "The Nation"), files this brief amicus curiae on the side of respondent and in opposition to the petitioner in this case. Both respondent and the petitioner have consented to the filing of this brief of *amicus curiae*.

The Nation is a federally recognized Indian tribe with an established, well organized tribal government, with long-standing treaty relationships with the United States. Petitioner challenges the decision below by contending that Oklahoma may tax transactions within Indian country of the Chickasaw involving the Chickasaw's members. Such a ruling is argued to mean that the Nation and its members are subject to virtually total state authority and control on all Indian-owned lands restricted against alienation by federal law. A holding

by this Court in favor of petitioner on these grounds would have a devastating impact on the Nation and its members, for it would deprive the Tribes of many traditionally exercised governmental authorities, most particularly the ability to raise revenue to fund operations.

The Tribes governmental interest are vital. The Nation submits the attached brief to show that the jurisdictional status of Indian owned restricted lands resides with the Tribal and Federal government. The Nation also wishes to address the history of decisions by this Court and the lower federal and state courts precluding state jurisdiction, and upholding federal and tribal jurisdiction, over Indian lands in Oklahoma, including allotments, reserved lands and subsequently acquired lands. Both Congressional policy, and the consistency of federal and state court decisions upholding federal jurisdiction and denying state authority serve as reason for this Court to affirm the decision of the Court of Appeals for the Tenth Circuit.

INTEREST OF AMICUS CURIAE

The Nation is a federally-recognized Indian tribe, having a well-organized tribal government with a continuous treaty relationship with the United States, which began in the earliest years of the Republic. The governmental authority of the Nation would be seriously compromised if the Court were to rule favorably on the contentions presented by petitioner. The Nation has a vital interest in protecting its governmental authority, and the corresponding exemption from state jurisdiction. This authority and exemption is currently the subject of ongoing litigation following this Court's decision in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993) (*hereinafter Sac and Fox Nation*).

The Nation administers its own tribal court supported by Bureau of Indian Affairs grants and contracts, tribal tax revenues, and tribal funds. The Nation is organized with a written constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of June 26, 1936,

49 Stat. 1967 (25 U.S.C. §503) (*hereinafter* O.I.W.A.). The Nation has also incorporated the provisions of the Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. §461 *et seq.*) (Indian Reorganization Act) with Secretarial approval.

Pursuant to these fundamental foundations, the Nation has enacted, and enforced, a myriad of statutes which regulate the conduct of all persons within the Indian country subject to the jurisdiction of the Nation. The laws enacted by the Nation include provisions authorizing the incorporation of business and non-profit corporations, removal or discipline of elected tribal officials, the regulation of the gaming industry, regulation of the mineral mining industry including oil and gas mining, regulating security agreements and the filing and enforcement of liens, provisions for the levy and collection of tribal taxes including taxes on all forms of tobacco and motor fuels, regulation of certain industries, provisions providing for public health facilities and public housing, provisions defining the punishment for criminal offenses and providing for police and fire protection, as well as provisions for complete trial and appellate court systems with what is believed to be model tribal laws relating to tribal courts, civil, criminal, appellate, and juvenile procedure, and rules of evidence. Interpreters are provided in the tribal court when needed.

In addition to these statutory enactments, the courts of the Nation enforce tribal traditions and customs as the common law of the tribe in a manner similar to that in which American customs and traditions are enforced as the common law in state and federal courts. Actions relating to marriage, divorce, child custody, guardianships, probate of estates, contract rights, tortious conduct, and requests for relief in equity are not uncommon.

These laws are enforced within the Indian country of the Nation. This consists, at a minimum, of the trust or allotments and lands owned by the tribe reserved from allotment or acquired in trust by the United States or restricted against alienation by the United States pursuant to Acts of Congress, 25 U.S.C. §§177, 335, 465, 501. The Nation maintains the

position that its original reservation boundaries were not disestablished, or that at worst, the reservation was diminished but not disestablished in the allotment process. This question has not yet been authoritatively determined under the modern definition of Indian country, or the modern test for reservation disestablishment or diminishment as adopted by this Court in response to the enactment of 18 U.S.C. §1151.

The Nation has a direct interest in the outcome of this action insofar as the Oklahoma Tax Commission requests this Court to render a decision judicially allowing taxation of recognized tribal governments, tribal members, and Indian country without Congressional sanction which will directly effect the Nation's current federal district court litigation on remand from *Sac and Fox Nation, supra.*

SUMMARY OF ARGUMENT

1. Oklahoma may not tax Indian tribes for their sales of fuel within their Indian country. Both of the separate, but related, doctrines of pre-emption and infringement prohibit the tax at issue. Additionally, the Hayden-Cartwright Act, which was not addressed below, does not overcome the barrier against state taxation of Indians or Indian Tribes.

2. The State of Oklahoma has never had authority to tax Indian income within the territory of the Chickasaw Nation. Both the statutes creating the State of Oklahoma and the Treaty of Dancing Rabbit Creek recognized the prohibition of Oklahoma authority in the Chickasaw's Indian country.

3. Recent Congressional action underscores the legislative branch's policy prohibiting state interference in the Indian country. Thus, not only is Oklahoma prohibited from taxing Indians or Indian Tribes within the Chicksaw's territory, the Court should reconsider its recent policies regarding state jurisdiction over both non-member Indians and non-Indians.

ARGUMENT

I. OKLAHOMA MAY NOT APPLY ITS FUEL TAX AGAINST INDIAN TRIBES

The Petitioner argues that it has the ability to tax fuels sold by the Chickasaw. It does this through two mechanisms; first, that the state suffers harm by Tribal sales of gas without the State sales tax attached. Secondly, that the legal incidence of the tax is irrelevant to the state's ability to tax fuel sales within the jurisdiction of the Indian Tribes. Both arguments must fail when viewed against the long established jurisprudence of this Court in the special area of Indian Taxation.

A. OKLAHOMA CANNOT TAX THE SALE OF FUEL BY THE CHICKASAW NATION BECAUSE CONGRESS HAS NEVER DISSOLVED THE FEDERAL PRE-EMPTION BARRIER TO STATE JURISDICTION.

The Oklahoma Tax Commission would have the Court believe that this controversy is solely one of State vs. Tribal authority. In 1948, Congress codified the Supreme Courts existing common law classifications of Indian Country by the Act of June 25, 1948, 62 Stat. 757, codified in its present form at 18 U.S.C. §1151, which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Oklahoma was not excepted from the terms of this Act. This Court, while often speaking in terms of "reservation" or "allotment" or "dependent Indian community" as relevant in a particular circumstance has, since 1948, clearly held that "Indian country" is the legally recognized term of art defining the territorial area for the exercise of tribal self-government and federal supervision. *Sac and Fox Nation, supra. See also, United States v. Mazurie,* 419 U.S. 544 (1975); *DeCoteau v. District Court,* 420 U.S. 425 (1975)[1]; *United States v. John,* 437 U.S. 634 (1978); *Solem v. Bartlett,* 465 U.S. 463 (1984)[2]. In truth, Indian country is a question of the authority of the Federal government vis-a-vis the State.

Article I, Section 8, Clause 3 of the Constitution of the United States vests the sole power to control commerce between citizens or subjects of the United States and the Indian Tribes exclusively in the Congress of the United

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[1] In footnote 2 of the opinion, the Court stated: "If the lands in question are within a continuing 'reservation'; jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.' While §1151 is concerned on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the Court concluded: "In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. §1151(c)." *Id.* at 446.

[2] In footnote 8 at page 467 of the opinion of the Court stated: "Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of congress fall within the exclusive criminal jurisdiction of federal and tribal courts." (citations omitted).

States. The founding fathers explained their reasons for vesting such authority exclusively in Congress instead of a sharing arrangement with the States – as had been the case under the Articles of Confederation – in the following manner:

> [T]he prospect of present loss or advantage, may often tempt the governing party in one or two States to swerve from good faith and justice; but those temptations not reaching the other States, and consequently having little or no influence on the national government, the temptation will be fruitless, and good faith and justice be preserved. . . . Not a single Indian war has yet been occasioned by the aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States . . .

See, The Federalist No. 3, pp. 43-44 (C. Rossiter ed. 1961) (NAL Penguin, Inc. Publisher) and further:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a

> mathematical axion by taking away a part and letting the whole remain.

See, The Federalist No. 42, pp. 268-269 (C. Rossiter, ed. 1961) (NAL Penguin, Inc. Publisher).

Far from allowing the situation occasioned by the Articles of Confederation to remain, the Constitutional Convention intentionally framed the Commerce Clause to remove from the States all authority concerning commerce with the Indian Tribes by non-Indians. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In *Kennerly v. District Court*, 400 U.S. 424 (1971), the Court recognized that Public Law 83-280, 28 U.S.C. §1360 as amended by 25 U.S.C. §1322 was a "governing Act of Congress" concerning state authority to regulate matters involving Indians in the Indian Country thereby precluding reliance on an "infringement test" or application of a balancing test. Simply stated, Congress intended that States comply with this act in order to acquire jurisdiction over commerce with Indians in the Indian Country.

> Examination of the Federal statutes and State Constitutions have revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are . . . Oklahoma. . . . *Effect of the disclaimer of jurisdiction over Indian land within the borders of these States* – in the absence of consent being given for future action to assume jurisdiction – *is to retain exclusive Federal jurisdiction until Indian title to such lands is extinguished.* (emphasis added).

S. Rep. No. 699, 83rd Cong., 1st Sess., 1953 U.S. Code Congressional and Administrative News 2409, 2412 (legislative history).

This statute, commonly referred to as P.L. 83-280, expressly extends the civil and criminal laws having general application to all persons and property within the State into the Indian Country within the states subject thereto, with

certain limitations as to the application thereof to Indians of the affected Indian Country. This statute, then, is the sole Congressionally authorized general mechanism for states to exert authority over commerce with Indians in the Indian Country.

It is absolutely clear that with rare exception Congress has not allowed the taxation of Indians in "Indian Country" by a state. *Montana v. Blackfeet*, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). Nor may a state generally tax Indians in "Indian Country" even if a state has assumed criminal and civil jurisdiction over "Indian Country". *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976). The Court has recently held, however, that a state may tax non-Indians in "Indian Country" if the tax burden does not frustrate tribal self-government or federal policy. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In *Moe* and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) the Court allowed a tax on non-Indians. This Court held that the tax was on non-Indians and thus did not frustrate tribal self-government and was not prohibited by the federal preemption barrier. The Oklahoma Tax Commission differs from *Moe* and *Colville* because the Tax Commission has taxed the tribe directly. The Tenth Circuit correctly held that the incidence of the fuel tax fell upon the Indian retailer. *Colville, id.*, allowed the state tax because the first taxable event was the use, consumption or possession by the non-Indian. *Id.*, at 142, footnote 9. *Moe* likewise contains a specific statute that the tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer." *Moe*, 425 U.S., at 482. The Oklahoma Motor Fuel Tax code contains no such clear placement of the tax upon the

retailer. To the contrary, it specifically states that the distributor collects the tax "on behalf of a licensed retailer." 68 Okla. Stat. §505C.

B. THE STATE IS WITHOUT AUTHORITY TO TAX BECAUSE OF INTERFERENCE WITH TRIBAL SELF-GOVERNMENT.

The federal government maintains a federal policy encouraging Indian economic development and tribal self-government. If the tribal businesses must pay both state and tribal taxes on top of federal taxes, the Court will create an unlevel playing field in favor of the State. Economic development in Indian Country would be devastated or eliminated altogether by having to pay triple taxation, or the Tribal government will have to forego sorely needed tax revenues and its ability to exercise its governmental functions by creating a legal infrastructure within which to conduct trade and other business. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 388 (1976) noted the destructive effect of allowing the tribe to be subject to state and local tax.

State taxes would limit the tribes ability to raise and maximize tribal revenues, to determine whether to make certain property or transactions tax exempt, or to limit taxation of certain property or businesses in order to encourage economic development, all of which would directly infringe on their ability to govern their own affairs.[3] Such taxes also frustrate federal efforts to aid Indian Country. Congress annually appropriate approximately one billion dollars a year for Federal Indian programs. Yet almost half of this, $500 million, is then immediately pulled back out of Indian Country through federal and state taxes. *Id.* note 9, p. 188.

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[3] *See State and Indian Tribal Taxation on Indian Reservations – Is It Too Taxing?*, 1989 Harvard Law Symposium, Susan Williams and Keven Gover, pp. 180-181 (1990, President and Fellows of Harvard College).

The Oklahoma Tax Commission's attempt in this case to assess the Chickasaw Fuel taxes is substantively and procedurally defective. The State of Oklahoma has neither civil nor criminal jurisdiction within Indian Country. *Housing Authority of the Seminole Nation v. Harjo,* 790 P.2d 1098 (Okla. 1990), *Ahboah v. Housing Authority of the Kiowa Tribe of Indians,* 660 P.2d 625 (Okla. 1983). It is absolutely inconceivable that Congress would allow any significant state taxation in areas where the tribes are responsible for both civil and criminal jurisdiction. Furthermore, the responsibility of exercising civil jurisdiction carries with it the responsibility of regulating interaction with both Indian and non-Indian.

The Chickasaw, unlike any state government, are asked to exercise criminal and civil jurisdiction while having tax monies drained by both the federal and state taxing authorities. The State of Oklahoma has revenues drained from only one authority (federal), while tribal governments are responsible for both civil and criminal jurisdiction in the Indian Country within the State. Thus state taxation within "Indian Country" located in Oklahoma has not been allowed or authorized by Congress.

A key consideration in determining the authority of a state to tax within "Indian country" is whether the state has civil and criminal jurisdiction. In *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973), the Court, in dealing with such a situation, explained:

> . . . a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians . . . *But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected* . . . Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention . . . the admitted absence of either civil or criminal jurisdiction

> would seem to dispose of the case. (Emphasis added).

McClanahan, 411 U.S. at 178-179. Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in "Indian country". *Bryan v. Itasca County*, 426 U.S. 373 (1976). But there has never been any case which has held that a state may tax Indians within any part of "Indian Country" where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power.

Neither *Moe* nor *Colville* involved tribes which provided services to the taxpayers. But in Oklahoma the Indian Tribes provide the protection of civil laws to all individuals doing business within their jurisdiction. This protection and exercise of jurisdiction extends to both Indian and non-Indian alike.

The Oklahoma Indian Welfare Act restores the Indian Tribes in Oklahoma to their original exclusive jurisdiction over those transactions occurring within their country to the exclusion of the state. At a minimum the O.I.W.A. requires the state to show an affirmative subsequent Congressional delegation of authority to the state to enter the Indian Country within Oklahoma. The state has yet to show that it has received such a Congressional grant of power, except for the discredited reliance on the Enabling Act. In other words, prior to the creation of the State of Oklahoma, the Chickasaw and Amicus exercised undiminished and exclusive authority in civil matters arising in their country for the simple reason that no state existed to challenge that authority. Given the prohibition against assertion of state jurisdiction imposed by the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 and the failure of the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 and the failure of the Oklahoma Tax Commission to show any explicit general Congressional grant of authority to tax or regulate trade with the Indians since statehood in 1907, the State's position must fail.

C. THE HAYDEN-CARTWRIGHT ACT DOES NOT AUTHORIZE TAXATION WITHIN THE INDIAN COUNTRY OF THE CHICKASAW NATION.

Petitioner also relies upon the passage of the Hayden Cartwright Act, Section 10, Act of June 16, 1936, codified at 4 U.S.C. §104 as a basis for its ability to tax fuel sales within the Indian Country of the Chickasaw. While Amicus believes this is not properly before the Court as it was not briefed by the parties below, nor formed a basis for the circuit opinion, the brief of Amicus States went at length into the Act. Therefore, Amicus Sac and Fox Nation believes that at a minimum the Court should be aware that the Act does not apply to the Chickasaws.

The Hayden-Cartwright Act was enacted on June 16, 1936. It contained needed appropriations and amendments for the Federal Aid Highway Act. The particular provision that is addressed by Amicus States is codified at 4 U.S.C. §104(a):

> All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

The States and Petitioner have seized upon the use of the term "military or other reservations" as proof that the state may tax the Indian Country of the Chickasaw. There are two primary flaws with arguing that this provision creates a fulcrum that overcomes the presumption against state taxation of

Indian tribes. First, as before stated, is the requirement that taxation laws must be evidenced by clear congressional statements. Second, in order for this specific provision to apply to the Chickasaw, and thus to other Tribes in Oklahoma, there must be a reservation. Each of these points will be addressed in turn.

(a) In the field of Indian law special canons of construction apply to statutory interpretation. *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) (*hereinafter Cohen's*) explains that "generally they provide for broad construction when the issue is whether Indian rights are reserved or established, and for narrow construction when Indian rights are to be abrogated or limited." *Cohen's supra*, at 225 (1982 ed.) In order for a statute to take away sovereign rights of a tribe, this Court has required that clear and unambiguous language be used. Additionally it must be shown that Congress considered the consequences of its action as regards to the effect upon Indians and Indian tribes. *See United States v. Dion*, 476 U.S. 724 (1986) (discussing the abrogation of treaty hunting of eagles by the Endangered Species Act.)

Both the Petitioner and Amicus States refer to two Opinions that state that the Act applies to tribes, *Application of Federal and State Sales Taxes to Activities of Minominee Mills*, 57 Interior Dec. 129 (1940) and 38 Opinion of the Attorney General 522, (1936). However, these two opinions also failed to consider the unique statutory construction that comes into play regarding Indian tribes. The Opinions cited by Petitioner fail to do so. While noting the existence of these opinions, the Revised *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) explains:

> In passing this statute Congress did not consider its possible application to transactions involving reservation Indians. The tax authorization was first passed as part of a 1936 highway construction statute, and other sections of the Act refer to Indian reservation roads. Act of June 16, 1936, ch. 582, Sections 3, 6, 49 Stat. 1519, 1520, 1521. But the tax

> authorization was not part of the initial bill that passed the House and cleared the appropriate Senate committee. H.R. 11687, 74 Cong., 2d Sess (1936). *See* 80 Cong.Rec. 5613, 6408 (1936). Thus, the committee reports make no reference to it. H.R. Rep. No. 2371, 74th Cong., 2d Sess. (1936); S. Rep. No. 1967, 74th Cong., 2d Sess. (1936). A separate bill proposing the tax authorization had been introduced in the House. H.R. 3660, 74th Cong., 2d Sess. (1936). When the highway bill came before the full Senate, the provisions of H.R. 3660 were added as a floor amendment. 80 Cong. Rec. 6913 (1936). There is no separately published history on H.R. 3660, and the subsequent Conference Report on the amended highway bill added no explanation of the tax provision. H.R. Rep. No. 2902, 74th Cong., 2d Sess. 1 (1936). During final debate, a House member described the tax section as dealing with a problem in "post-exchange stores and on Government reservations." 80 Cong. Rec. 8701 (1936) (Mr. Whittington). *See also id.* (Senate).
>
> The Interior Solicitor has concluded that the statute does not authorize state taxation of fuel purchased by a tribal enterprise to operate a tribal sawmill but does authorize state taxation of retail sales by the tribal enterprise, both to Indians and to other persons. 57 Interior Dec. 129 (1940).

Cohen's, p. 412, footnote 62. This hardly qualified as a considered action relating to the effect it would have upon Indian Country.

Elsewhere within the same bill, appropriations are made for Indian roads. Section Three specifies that:

> [T]here is hereby authorized to be appropriated for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, *nontaxable Indian lands*, or other Federal reservations other than the forest reservations. (Emphasis added).

Act of June 16, 1936, §3. Section Six also specifically refers to "Indian reservation roads" and appropriates $4,000,000.00 for such roads. Thus, within the same act referred to by Petitioners it is illustrated that the Congress knew how to make separate provisions apply to Indian Country. If the term Federal reservation encompassed Indian reservations, there would have been no need to repeat a term which was a subset thereof. This makes particular sense as Indian reservations are not in reality set aside for the use and benefit of the federal government. Indian reservations were created, or reserved for the use and occupancy of Indian Tribes, who were and are at least a semi-sovereign separate and apart from the federal government.

Other contemporary Acts further illustrate the non-taxability of Indian lands within Oklahoma. Ten days after the passage of the Hayden-Cartwright Act the Congress passed the Oklahoma Indian Welfare Act, Act of June 26, 1936. This Act was to promote the general welfare of the Oklahoma Indian, and bestow upon them the benefits of the Indian Reorganization Act, Act of June 18, 1934. In so doing, Section One allowed the acquisition of lands for Oklahoma Indians and provided that "Title to all lands so acquired shall be taken in the name of the United States, in trust . . . , and while title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax." Thus by specific legislative intent, gross production taxes, *and no other,* were made applicable to newly acquired Indian trust land.

(b) Up to this point, Petitioner has consistently argued that there are no reservations remaining in Oklahoma. *See Sac and Fox Nation, supra.* If the Court should decide that the 4 U.S.C. §104 applies to Indian Tribes, then in order for this Court to apply the Act to the Chickasaw and other Oklahoma Tribes, this Court must find that reservations continue to exist in Oklahoma.

The effect of the early statutes defining Indian country was summarized by the noted Indian law scholar, Felix Cohen, in his *Handbook of Federal Indian Law* 6 (1942 ed.) as follows:

> Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all.[4]

Although the 1834 definition of Indian Country was not included in the Revised Statutes of the United States, and therefore repealed, it provided a useful mechanism for the Court to apply statutory laws relating to "Indian Country" and "Indian Reservations". *Donnelly v. United States*, 228 U.S. 243, 269 (1913). In a series of now famous cases, the Court developed a definition of "Indian Country" at common law which included Indian reservations, *Bates v. Clark*, 95 U.S. 204 (1887); *Donnelly, supra*, trust and restricted Indian allotments, *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926), and areas set aside for the use and occupancy of Indians (dependant Indian communities) although not called a "reservation", *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. McGowan*, 302 U.S. 535 (1938).

The Hayden-Cartwright Act speaks of the application of state taxes to federal reservations. However, reservations are just one manner in which Indian lands arise to the status of

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[4] The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. 18 U.S.C. §1161 (liquor laws); Act of February 15, 1929, Ch. 216, 45 Stat. 1185 (health and education) (25 U.S.C. §231); 25 U.S.C. §§232, 233 (New York); *see also*, Public Law 83-280.

Indian Country. The statutory definition of Indian Country, contained in 18 U.S.C. §1151 lists three categories of Indian lands; reservations, allotments and, dependent Indian communities. Indian Country is the term of art that refers to land validly set apart for the use of Indians because of their status as Indians. *Sac and Fox Nation,* 113 S.Ct., at 1991. The general rules of tribal sovereignty and preemption or infringement articulated by this Court apply generally to all categories of Indian Country. *Sac and Fox Nation, supra.* However, if this Court is to apply 4 U.S.C. §104 to Indians, and Congress uses different terms within the Act, as it did in section three of the Hayden Cartwright Act, it must be assumed that different meanings were ascribed to those terms. Thus, the term in Section three, "nontaxable Indian lands" which would clearly include not only reservations, but also allotments and dependent Indian communities, must mean something different than "United States military or other reservations."

II. THE STATE OF OKLAHOMA HAS, AB INITIO, BEEN PRE-EMPTED FROM TAXING INDIAN COUNTRY INCOME WITHIN THE CHICKASAW NATION.

A. CONGRESS PRECLUDED STATE AUTHORITY IN THE INDIAN COUNTRY FROM THE BEGINNING.

> It rests with Congress to determine when the guardianship relation shall cease. Thus far Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers. *Board of County Comm'rs. of Creek Country v. Seber,* 318 U.S. 705, 718 (1943). (citations omitted).
>
> In our opinion, the purpose expressed in [section 1 of the Oklahoma Enabling Act, 34 Stat. 167] to reserve to the government of the United States the authority to make laws and regulations in the future

> respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulation of the subject.
>
> . . .
>
> The Reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new state is clearly supportable under the Federal Constitution, art. 1, Section 8, which confers upon Congress the power "to regulate commerce . . . with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a state. *Ex Parte Webb*, 225 U.S. 663, 683 (1912).

Prior to 1890, all government in Oklahoma was tribal government, and the tribes residing in Oklahoma enjoyed the full cornucopia of powers possessed by Indian tribes generally. The beginning of non-tribal government in Oklahoma came in 1890 with the advent of the Territory of Oklahoma. The Oklahoma Organic Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890), contained a proviso of significance to the present case. Section 1, in pertinent part, states:

> Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this Act had not been passed.

It is clear that the tribal governments that predated and preceded the creation of the Territory of Oklahoma were vested with exclusive civil jurisdiction over their territory

including exclusive authority to levy and collect taxes. By enacting this proviso, the quoted Section 1 of the Organic Act, Congress clearly intended to preserve exclusive federal and tribal jurisdiction undiminished by the creation of the new Territory, and later the new State.

The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, in Section 1 continued these federal and tribal protections through the creation of the state. Section 1 provides:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the state of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such right shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

Congress expressly reserved, in Section 1 of the Oklahoma Organic Act, and again in Section 1 of the Oklahoma Enabling Act, its complete and exclusive authority over the persons, property and other rights of Indians "by treaties, agreement, law or otherwise." Pursuant to these acts, Article 10, Section 6 of the Oklahoma Constitution exempts from state taxation:

> such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws

and Article 1, Section 3 thereof states in pertinent part:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

The intent of the Oklahoma Organic Act with respect to the Indian tribes, and therefore that of the Oklahoma Enabling Act which contains substantially the same language, is illustrated by an exchange between Congressmen Mansur and Turner during the floor debates. The purpose of the Oklahoma government vis-a-vis the Indian tribes and their territory was explained as follows:

> Mr. Mansur: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?
>
> Mr. Turner: But I suggest to the gentleman that this is no longer a reservation, but a Territory.
>
> Mr. Mansur: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*

51 Cong. Rec. 2104 (1890) (remarks of Messrs. Mansur and Turner) (emphasis added). Perhaps in part because the allotment agreements were then being negotiated, Congressman Mansur emphasized that the Indian tribes and their reservations were to be unaffected by the creation of Oklahoma:

> I challenge any gentleman on this floor – I care not who he is – to take any one of the first twenty-four sections of this bill [the Sections relating to Oklahoma Territory] and show where it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of

> this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation . . .
>
> Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate.

Id. at 2176. Notwithstanding the claims of the Oklahoma Tax Commission, it appears that the proponents of the bill to create Oklahoma did not think they had to destroy tribal government or Indian treaty rights in order to accomplish their purpose.

These provisions constitute specific federal statutes speaking directly to limitations of the jurisdiction of the State of Oklahoma in Indian matters. Moreover, this bar to state authority coincides with the creation of the jurisdictional competitor. From a reading of this statute, it can be said the Territory and State have *ab initio* been preempted in this area.

The outgrowth of this summary review, is that clearly the *per se* rule of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) and *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985) prohibiting State taxation of Indians in Indian Country, remains applicable to Indian tribes in Oklahoma in general, and the Chickasaw Nation in particular. The corollary to this rule is that the failure of the Oklahoma Tax Commission to plead and prove specific unambiguous congressional authority both to levy, and collect, the particular taxes at issue is fatal to its cause. Simply stated, state authority to tax an Indian tribe or individual Indians within Indian

Country are completely preempted by federal law in the absence of Congressional action to the contrary.[5]

B. THE CHICKASAW TREATIES PRECLUDE STATE TAXATION WITHIN THE NATION'S INDIAN COUNTRY.

Article IV of the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, explicitly grants the Chickasaw Nation exclusive jurisdiction over itself and its descendants thus leaving no room for state taxation of the income within the jurisdictional Indian Country of the Chickasaw Nation. Article IV of the treaty states in pertinent part:

> no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . .

This is consistent with this Court's ruling in *McClanahan, supra* at 170-171:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by an act of Congress.

The rules discussed above regarding statutory interpretation apply even more vigorously when, as here, the state asserts that Treaty rights have been abridged. *Dion,* very explicitly held:

> in the absence of explicit statement, " 'the intention to abrogate or modify a treaty is not to be lightly

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[5] Amicus Sac and Fox Nation would also point the Court to Part III of the nation's brief, *post.*

> imputed to the Congress.' " *Id.*, at 413, Quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934). Indian treaty rights are too fundamental to be easily cast aside.

Dion, 476 U.S., at 739, citing *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Combined with the fact that treaties are to be liberally construed in favor of the Indians, *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) and that treaties should be construed as the Indians themselves would have understood them, *Choctaw Nation v. United States*, *supra*, militates strongly in favor of the position of the Chickasaw. It bears remembering that during the very years that the Treaty of Dancing Rabbit Creek was being negotiated the Cherokees were litigating the exact issue of attempts by the state of Georgia to enforce its state laws upon the Cherokee Nation, which along with the Chickasaws compose one of the Five Civilized Tribes. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). When the proper standard of treaty abrogation and interpretation of this Court is read in conjunction with the discourse on the floor of Congress during the debates regarding the Oklahoma Organic Act is should be clear that Article IV of the Chickasaw Treaty continues in full force to this day.

The income at issue in this case is earned within Chickasaw Indian Country through employment by the tribal government, where both the federal and tribal government's interest in establishing strong tribal governments is at its zenith and are *per se* preempted as an infringement on tribal self-government.

The Petitioner also argues that its tax should be allowed because it provides services to members off of Tribal land. The Petitioner continues to ignore that fact that the Chickasaw Nation provides governmental services to its members and other residents of its jurisdiction while the State does not. The State Courts and Federal Courts sitting in Oklahoma are certainly aware of the situation. *United States v. Littlechief*, No. 76-207-D (W.D. Okla., Nov. 7, 1977) followed and reprinted in *State v. Littlechief*, 573 P.2d 263 (Okla. Crim.

1978) (murder case); *C.M.G. v. State*, 594 P.2d 798 (Okla. Crim. 1979) *cert. den.* 444 U.S. 992 (1979) (murder case); *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (hunting and fishing); *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990) (country sheriff without authority to arrest Indian within Indian Country); *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990) (eviction); *Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983).

Employment within Indian Country directly involves the Tribe through its inherent regulatory power over the work place, its form of government, and the federal policy of encouraging economic development within Indian Country. *See e.g.*, Indian Self-Determination Act, 25 U.S.C. Section 450a *et seq.* and Indian Finance Act, 25 U.S.C. Section 1451 *et seq.* Members and non-members enjoy the protection of the laws, courts, police, and other Tribal services while within the Indian jurisdiction. There is nothing in the opinion below which suggests that the State of Oklahoma offers governmental services for those individuals, members or not, within the Chickasaw jurisdiction. The State of Oklahoma has no legal duty to provide services to the Chickasaw Nation's jurisdiction, and in some instances could be liable for attempting to provide services. *See Ross v. Neff, supra.*

Perhaps the Tax Commission believes the transactions being taxed occurs off Indian Country. However, it should be very clear that the transactions attempting to be taxed by the state arise on Tribal lands. When a person is employed, and work is done within Chickasaw lands and those actions are taxed by the state, then Tribal self-government is infringed by the state. The State taxes concerning income tax are directed at building roads. The taxes involved herein are used by Chickasaw for various governmental functions.

III. COURT SHOULD RECONSIDER ITS RECENTLY DEVELOPED INDIAN DOCTRINE IN LIGHT OF RECENT CONGRESSIONAL ACTION REJECTING THE COURT'S RECENT SHIFT IN POLICY

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the court embarked on two new, and untested policies to be applied in the field of federal Indian law. First, the Court created from the whole cloth the idea that tribal powers of self-government could be limited by judicial decree in instances where Congress had taken no action to limit such powers if the Court believed that the exercise of a challenged tribal governmental power was "inconsistent with the Tribe's status." Secondly, the Court determined that the exercise of criminal jurisdiction over non-Indians by Indian tribal courts was "inconsistent with the status" of the Suquamish Indian Tribe. The natural outgrowth of this case included cases such as *United States v. Wheeler*, 435 U.S. 313 (1978) decided just after *Oliphant*, in which the Court carefully limited its language in a case resulting in the recognition of inherent tribal authority over the punishment of criminal offenses to tribal members.

On the civil side, the Court also began to implement its new concept of distinction between tribal members and all other persons by beginning to authorize state taxing and regulatory authority over non-Indians and members of Tribes not a part of the particular reservation at issue. Thus, in *Colville*, 447 U.S., at 161 (1980), and its progeny, the Court announced that the State could tax the sales of cigarettes to "non-members" – even if the non-member was an Indian.[6]

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[6] The "cigarette cases" could have been explained through a proper analysis of Public-Law 83-280 had the Court chosen to do so, and the same result would have been reached in each case prior to *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 111 S.Ct. 905 (1991). In *Potawatomi*, the Court directly announced for the first time that States had the authority to tax non-tribal member Indians without compliance with the Congressionally mandated prescription for the extension of state law into

Although inconsistent with almost five hundred years of historical relations between Indians and non-Indians, and two hundred years of relations between the United States and the Indian Tribes, these new activistic judicial doctrine logically could result only in a ruling that Tribe's had also lost criminal jurisdiction over Indians who were members of other tribes, as well as civil jurisdiction over non-Indians and Indians who were members of other tribes unless the Court could infer some reasonable semblance of consent for the exercise of tribal jurisdiction over such non-tribal members. *See e.g., Montana v. United States*, 450 U.S. 544 (1981). Finally, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court reached the logical conclusion of this new line of reasoning by holding the Tribes' had, by implication only, lost their criminal jurisdiction over non-member Indians because the Court – without benefit of an Act of Congress – determined that the exercise of such government authority was "inconsistent with their status."

The response from Congress was immediate and direct.[7] For the first time since *In Re Heff*, 197 U.S. 488 (1905), ninety years ago, Congress passed legislation specifically designed to reverse the Indian law doctrine advanced by the Court.[8] In a military appropriation bill, P.L. 101-511 (1990),

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the Indian Country, and the adjudication of disputes arising in the Indian Country involving Indians or their property in the state courts.

[7] At least five States petitioned Congress to reverse the *Duro* decision, and the legislative history indicates strong support from others. *See*, for example, 140 Cong. Rec. S.2635, S.2637, POM-399. While certain state tax commissions will attempt to exercise jurisdiction when they believe the Court will allow them to collect revenues from the Indian Country the legislative arms of the "Indian" States do not want to spend the revenues needed to provide law enforcement and other services to the Indian Country.

[8] After the Congressional "fix" of *In Re Heff*, the Court acknowledged the Congressional action, overruled *Heff*, and followed the doctrinal notions behind the statute adopted by Congress in that instance. *United States v. Nice*, 241 U.S. 591 (1916).

Congress first passed a "temporary" statute designed to overturn the *Duro* decision, and in P.L. 102-137, 105 Stat. 646, 102 Cong. 1st sess., the fix was made permanent. In this legislation, and its accompanying legislative history[9] make it abundantly clear that the Congress does *not* subscribe to these new doctrines lately advanced by the Court, and specifically rejected the attempt to distinguish between members of the local tribe, and other Indians who are living, working, or simply come within that tribe's Indian Country. Simply stated, the *Duro* decision invited the Congress to review these new Supreme Court Indian law doctrines, Congress did so, and rejected them in no uncertain terms.

In addition to the Congressional rejection of the Court's doctrines drawing distinctions between "non-member" and "member" Indians and the idea of implied diminishment of inherent Indian sovereignty, the Congress has consistently acted of late in support of tribal sovereign authority. *See, e.g.*, P.L. 103-176, the Indian Tribal Justice Act (1993), and its accompanying history.[10] In this Act Congress explicitly finds that the trust responsibility of the entire United States government "includes the protection of the sovereignty of each tribal government" (Section 2(2)); that Congress has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes through statutes, treaties, and the exercise of administrative authorities (Section 2(3)); and that Indian tribal justice systems are important for the preservation of the public health and safety, the political and cultural integrity of tribal government, and the adjudication of disputes affecting important personal and property rights. (Section 2(5)(6)(7)). Likewise, several members of Congress have publicly

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[9] H. Conf. Rpt. 101-938; HR No. 102-61, May 14,1991; SR No. 102-153, Sept. 19, 1991; H. Conf. Rpt. 102-261, Oct. 22, 1991; and related reports; SR No. 102-168, Oct. 2, 1991.

[10] House Report No. 103-205, August 2, 1993; Senate Report No. 103-88, July 15, 1993; House Conference Report No. 103-383 (Nov. 19, 1993).

announced their concern that an understanding of traditional Indian law doctrines beginning with *Worcester v. Georgia*, 31 U.S. 515 (1832) should be a prerequisite for appointment to the federal bench. Congressional Record – Senate, Monday, August 2, 1993, 103rd Cong. 1st Sess. 139 Cong. Rec. S. 10083, The Supreme Court of the United States. (Confirmation hearing of Justice Ginsberg.)[11]

If one reviews the legislation of Congress since 1970, research does not reveal statutes passed to limit the exercise of tribal authority, or to distinguish tribal authority between members and non-members, not to authorize the application of state law to either Indians or non-Indians in the Indian Country, nor to limit tribal authority with regard to fee lands within the Indian Country. See, 18 U.S.C. §1151(a) "notwithstanding the issuance of any patent", and *Seymore v. Superintendent*, 368 U.S. 351 (1962). Yet these things the Court has created without direction from the Congress within this same period. In short, Congress has now rejected these notions. The statutes of Congress passed with regard to Indian affairs since 1970 are replete with approving references to the doctrines of inherent Tribal sovereignty, lack of state authority, and the constitutionally created Congressional monopoly in the regulation of relations between citizens of the United States, and Indian person within the Indian Country in their legal and political status as Indians, U.S. Const. Art. 1, Sec. 8, Cl 3. If one accepts the Congressional philosophy, expressed in these statutes and legislative reports, it is apparent that state action with respect to all commerce affecting persons and property in the Indian Country in which Indians are interested in their governmental or proprietary capacity is preempted by the Congressional control of such commerce, or the Congressionally acknowledged inherent rights of the Tribe to govern both

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[11] I also want to put future Supreme Court nominees on notice that I will insist they have an interest and understanding Indian Country law. After today, I will not vote for a nominee unless I am satisfied that they have demonstrated this concern (Remarks of Mr. Pressler).

their members and their Indian Country territory, in the absence of an explicit statement of Congress authorizing the application of state law. The Court should reassess its Indian law doctrines in light of the first Congressional action directly intended to reverse Court Indian law doctrine in almost one hundred years, and announce its return to the logical clarity of the intent of the original framers of the Constitution as expressed in the *Worcester* decision, as expected by Congress.

CONCLUSION

If the Court is to remain faithful to the intent of the framers of the constitution, it must uphold the authority of Congress alone to allow taxation of transactions involving Indians in the Indian Country and affirm the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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